Supreme Court, U.S.
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IN THE
Supreme Court Of The United States
October Term, 1994

A. MICHAEL'S PIANO, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED[1]

1. Whether Section 21(f) of the Federal Trade Commission Act, 15 U.S.C. § 57(b)-2(f), and exemption 3 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(3), should be read broadly, contrary to long-standing interpretations of FOIA that exemptions are to be read narrowly, to authorize the Federal Trade Commission ("FTC") to withhold from mandatory disclosure all agency records submitted in an investigation that the FTC could have obtained through subpoena?

2. Whether the "attorney work product" protection of exemption 5 of FOIA, 5 U.S.C. § 552(b)(5), applies to legal materials that FTC attorneys generated in an investigation when no enforcement proceeding or other litigation actually ensued and the FTC provided no explanation of its decision to close the investigation?

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[1] Petitioner, A. Michael's Piano, Inc., has no parent or subsidiary companies. Tracy Patrick Smith, Nicholas Vitagliano, and Maria Vitagliano appeared as Plaintiffs in the District Court and as Plaintiffs-Appellants in the caption of the Second Circuit's opinion. The Second Circuit stated that only A. Michael's Piano was sufficiently designated as a party on appeal.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
A. Exemption 3	7
B. Exemption 5	10
CONCLUSION	11

TABLE OF AUTHORITIES

Cases:	**Pages**
A. Michael's Piano, Inc. v. FTC, 1993-1 Trade Cases P70,112 (D. Conn. 1993), *aff'd in part, vacated and remanded in part*, 18 F.3d 138 (2d Cir. 1994)	1
Anderson v. Department of Health and Human Servs., 907 F.2d 936 (10th Cir. 1990)	6
Aronson v. I.R.S., 973 F.2d 962 (1st Cir. 1992)	6,8,9
FTC v. *Grolier, Inc.*, 462 U.S. 19 (1983)	10
Hickman v. Taylor, 329 U.S. 495 (1947)	10
NLRB v. Sears Roebuck & Co., 421 U.S. 132 (1975)	10
SEC v. Chenery Corp., 332 U.S. 194 (1947)	9
Statutes and Regulations:	
5 U.S.C. § 552	2,9
5 U.S.C. § 552(b)(3)	2,5,6,9
5 U.S.C. § 552(b)(4)	3
5 U.S.C. § 552(b)(5)	2-3,5,10
15 U.S.C. § 45	2
15 U.S.C. § 46(f)	3
15 U.S.C. § 57(b)-1(i)	4
15 U.S.C. § 57(b)-2(f)	2, 4 , 5, 6, 7, 8, 9
28 U.S.C. § 1254 (1)	1
28 U.S.C. § 1331	5

Legislative Materials:

126 Cong. Rec. 11914 (1980) 8

Other Authority:

Federal Trade Commission Operating Manual § 3.2.3.2. (1991) 4

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 18 F.3d 138 (2d Cir. 1994) and is reproduced in the petitioner's appendix (Pet. App.) at A1. The opinion of the District Court, dated January 26, 1993, is reported at 1993-1 Trade Cases P70,112 (D. Conn. 1993) and is reproduced at Pet. App. A18. The judgment of the District Court is dated January 29, 1993, and is reproduced at Pet. App. A21.

JURISDICTION

The opinion of the Court of Appeals is dated March 3, 1994. The Second Circuit denied the petition for rehearing on May 19, 1994. *See* Pet. App. A22. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Federal Trade Commission Act, 94 Stat. 385, as amended, 15 U.S.C. § 45 (1988), provides in pertinent part as follows:

§ 57b-2. Confidentiality

* * * *

(f) Exemption from disclosure

Any material which is received by the Commission in any investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission, and which is provided pursuant to any compulsory process under sections 41 to 46 and 47 to 58 of this title or which is provided voluntarily in place of such compulsory process shall be exempt from disclosure under section 552 of Title 5.

The Freedom of Information Act, 80 Stat. 383, as amended, 5 U.S.C. § 552 (1988), provides in pertinent part as follows:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

* * * *

(b) This section does not apply to matters that are —

* * * *

(3) specifically exempted from disclosure by statute (other than section 552b of this title) provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

* * * *

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency ....

* * * *

STATEMENT OF THE CASE

This case involves the public's statutory right of access to agency records compiled during the course of a *closed* Federal Trade Commission ("FTC") consumer protection investigation in which the FTC furnished no public explanation of its decision to close the investigation. These materials are of tremendous significance to citizens interested in the operations of the FTC, buyers of products, and those contemplating or involved in litigation. Primarily at issue are (1) non-proprietary[2] documents submitted by a company under investigation in response to staff letters and telephone calls and (2) staff recommendations preceding a formal decision to close the investigation.

Petitioner A. Michael's Piano, Inc. ("AMP") became an authorized dealer of Steinway & Sons pianos in September 1982 and soon thereafter became the largest single-location Steinway dealer in the nation. AMP was successful in large part because: (1) it maintained a special climate-controlled showroom that housed the largest display of Steinway pianos in the country, thereby offering customers the widest possible selection from which to choose an instrument; (2) AMP's industry leadership in "finishing" (*e.g.*, harmonizing and tuning) the pianos in its showroom; and (3) AMP's refusal to follow Steinway's "suggested retail prices." From the beginning, Steinway representatives showered encomiums on AMP's sales record and

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[2] Proprietary materials are protected by exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4), and section 6(f) of the FTC Act, 15 U.S.C. § 46(f).

quality standards, but pressured AMP to adhere to Steinway's suggested retail prices. In late 1987, Steinway attempted to impose a new contract on AMP. When AMP refused to accept the agreement that Steinway proposed, Steinway refused to ship AMP new pianos for resale.

From 1987 to 1989, AMP continued to sell Steinway pianos out of its large inventory and to service the pianos that it had sold. In the course of servicing those pianos, AMP noticed a consistent pattern of apparent defects, including many cracked soundboards. When AMP reported this pattern of apparent defects to Steinway, Steinway promptly terminated AMP as a dealer, exercising its contractual right to buy back the remaining pianos from AMP's inventory.

At first, Steinway agreed that the cracked soundboards were a major defect and honored its warranties either by replacing the soundboard or exchanging the defective pianos. After the magnitude of the problem became clear, Steinway shifted its policy and refused to take any action whatsoever with respect to the problems that its pianos were experiencing.

In 1990, approximately sixty Steinway customers called the problem with Steinway pianos to the attention of the State of Connecticut, which in turn referred the matter to the FTC. The staff of the FTC's Boston Regional office then opened an "initial phase" investigation. Under FTC procedures, the FTC does not subpoena documents during an "initial phase" investigation. *See* Federal Trade Commission Operating Manual §3.2.3.2 (1991) ("Compulsory procedures are not ordinarily utilized in the initial phase of investigations; therefore, facts and data which cannot be obtained from existing sources must be obtained through the use of voluntary procedures."). Significantly, at the same time that Congress passed the provision at issue in this case, Section 21(f), it also amended the FTC Act to prohibit the staff from issuing any subpoenas, contrary to prior practice. Section 20(i) of the FTC Act, 15 U.S.C. § 57(b)-1(i).

During the staff's "initial phase" investigation, the Boston Regional Office requested and received documents from Steinway. Later, the staff filed a memorandum that made recommendations regarding whether the "initial phase" investigation should be expanded into a "full phase" investigation — a determination that had to be made by the director of the FTC Bureau of Consumer Protection in Washington. The Bureau of Consumer Protection later opened a "full phase" investigation. During the "full phase" investigation, the FTC staff again requested and received information from Steinway as well as other manufacturers. This information was submitted pursuant to both written staff requests and telephone requests.

In December 1991, the Boston staff attorney prepared a memorandum analyzing the issues presented and making a recommendation regarding the final disposition of the inquiry. In January 1992, the Bureau of Consumer Protection closed the investigation without any explanation of its reasons for doing so.

Waiting until the investigation was closed, petitioner submitted a FOIA request to the FTC in January 1992, seeking copies of all agency records collected or compiled by the FTC staff during its investigation of Steinway. The FTC denied the request in large part, citing exemption 3 (as made applicable by § 21(f) of the Federal Trade Commission Act) and exemption 5, among others.

In July 1992, petitioner filed suit in the United States District Court for the District of Connecticut based on Federal question jurisdiction, 28 U.S.C. § 1331. The District Court granted the FTC's motion for summary judgment on January 27, 1993, without affording AMP the benefit of either oral argument or any discovery.

Thereafter, AMP appealed to the United States Court of Appeals for the Second Circuit. The Court of Appeals vacated and remanded the trial court's determination with respect to

exemption 3 and affirmed the District Court's determination with respect to exemption 5. Pet. App. A17.

In addressing the exemption 3 issue, the Court of Appeals correctly stated that the determinative issue was whether non-proprietary documents submitted to the FTC during the course of an investigation are "provided voluntarily in place of . . . compulsory process" within the meaning of § 21(f) of the FTC Act, and were therefore exempt from mandatory disclosure under FOIA exemption 3. Pet. App. A10.

The parties agree that Section 21(f) is a "withholding" statute under exemption 3. The major issue — one of first impression in the United States Courts of Appeals — was whether all or virtually all records that the FTC staff gathers in an investigation are exempt. The FTC argued in the District Court that this was the case and the District Court agreed. Petitioner's position in the Court of Appeals was that the FTC and District Court interpretation fails to ascribe any meaning to Congress' requirement that materials be submitted "in place of . . . compulsory process."

The Court of Appeals correctly noted that FOIA "expressed a public policy in favor of disclosure so that the public might see what activities federal agencies are engaged in." Pet. App. A7. The Court, however, went on to state that exemption 3 "incorporates the policies of other statutes." Pet. App. A8. The Court of Appeals noted the existence of a split between other United States Courts of Appeals on the question whether withholding statutes — such as Section 21(f) — like FOIA exemptions themselves, should be narrowly construed. *Compare Aronson v. I.R.S.* 973 F.2d 962, 965-66 (lst Cir. 1992) (Breyer, J.)(negative) *with Anderson v. Department of Health and Human Servs.*, 907 F.2d 936, 950-51 (10th Cir. 1990) (affirmative). Pet. App. A8-A10.

The Second Circuit panel attempted to side-step the issue, seeing "no need to choose sides in a conflict between our sister

circuits." Pet. App. A9. The court rejected petitioner's contention based on the words of Section 21(f) that that section required a "viable possibility" of compulsory process as "vague," "amorphous" and creating "needless difficulties". Pet. App. A10.

Instead, the Court of Appeals, while mentioning the "plain language" of Section 21(f) and referring to its legislative history, chose a standard that it deemed "workable". Pet. App. A13. The Court held that "we think a workable standard is one that permits the FTC properly to invoke § 21(f) by showing that (1) it had requested documents that were (2) relevant to an ongoing investigation within its jurisdiction, and (3) the documents could have been subpoenaed had the party refused to comply with the FTC's requests." Pet. App. A13. (Emphasis added). The Court went on to state that the FTC need not "go to the trouble" of actually authorizing the issuance of subpoenas for the production of these documents as long as the court is satisfied that the documents in the agency's possession were, when obtained, subject to the agency's subpoena power. Pet. App. A13. The Second Circuit remanded the case to the trial court for further examination of this issue. Pet. App. A13.

With respect to exemption 5, the Court of Appeals held that the "attorney work product" doctrine applies, even if a staff attorney is considering recommending closing an investigation, when no litigation or enforcement action ensues and the FTC gives no reason for closing its investigation. Pet. App. A15-A17.

REASONS FOR GRANTING THE WRIT

A. Exemption 3.

There exists a clear conflict between the Circuits whose resolution is important to FOIA requesters and the Federal agencies that operate under FOIA as well as those who have an interest in the prosecutorial determinations of the FTC, buyers of

products, and those seeking to aquire information before making a determination on whether to commence litigation. As noted above, the conflict involves whether a withholding statute, such as § 21(f), should be construed narrowly, as are the FOIA exemptions themselves; or broadly and more deferentially, pursuant to Administrative Procedures Act standards.

The Court of Appeals' approach to the conflict was that there was "no need" to take sides. Pet. App. A9. At the same time, the Court of Appeals explicitly agreed with the FTC that the Supreme Court "has never applied a rule of narrow or deferential construction to withholding statutes," and implicitly agreed with *Aronson* as evidenced by the fact that it did not apply a narrow rule of construction. Pet. App. A9.

In this case, the language of the statute is ambiguous. The question is how the statutory phrases "voluntarily" and "in place of compulsory process" are interpreted. As the Court of Appeals made clear, the legislative history makes clear that the words "provided voluntarily in place of compulsory process" are intended to place a real limit on the scope of § 21(f). Pet. App. A11-A12. In fact, Senator Ford explicitly noted that part of the purpose of not granting a blanket exemption was to "encourage compliance with legitimate information demands." 126 Cong. Rec. 11914 (1980). The Court of Appeals "guided," but not controlled by, "Congress' aim, the language and the legislative history", formulated a standard it regarded as "workable," rejecting[3] petitioners' interpretation based on the text of the statute. Pet. App. 13.

Petitioner contends that the Court of Appeals' test nowhere appears in the statute or in the legislative history, and that the case is more logically controlled by the words and rules of construc-

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[3] Given the tough legal standards applicable to FTC subpoenas, there is no reason to believe that the Second Circuit standard is in fact workable.

tion of the withholding statute.[4] If the withholding statute is construed narrowly, then ambiguity should be resolved in favor of petitioner and the Court of Appeals test should be rejected. If on the other hand, Section 21(f) is subject to a deferential rule of construction, different rules — those applicable to review of agency determinations under the Administrative Procedure Act, 5 U.S.C. § 552 *et seq.*, which were not followed in this case — should apply.

Resolution of this conflict has important implications for FOIA requesters and the federal agencies that must deal with the interplay between exemption 3 of the FOIA and withholding statutes. The courts will apply different legal and substantive standards to a FOIA denial depending on which set of rules prevails.

Traditionally, under FOIA, review is, of course, *de novo*. Exemptions are to be construed narrowly. If, on the other hand, the *Aronson* case is to be the rule, the review of withholding determinations will be deferential, not *de novo*, and based upon the "arbitrary, capricious or abuse of discretion" standard. Coupled with that standard, however, will be increased responsibility of agencies to put forward consistent and clear explanations of their decisions. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

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[4] The Court of Appeals held that the ultimate test is whether the documents "could have been subpoenaed" by the FTC. Pet. App. A13. Yet, the legislative history directly refutes this interpretation. As the Court of Appeals correctly noted, the Senate-passed bill would have exempted any material provided pursuant to any demand or otherwise. The House had no such confidentiality provision. In settling on the current language, the Conference Committee did not — as it easily could have — provide protection for any material subject to the FTC's subpoena power, but limited the exemption to documents provided "in place of" a subpoena.

B. Exemption 5

The Court of Appeals' interpretation extends the attorney work product privilege from the litigation context to the investigative context. In the landmark case that established the privilege, *Hickman v. Taylor,* 329 U.S. 495, 510 (1947), the Supreme Court carefully explained that the work product privilege (which came after liberalized discovery rules were enacted) was a qualified privilege whose purpose was to keep one attorney from, in effect, "free-riding" on the work of another in adversary litigation.

In that context, as in *FTC v. Grolier, Inc.* 462 U.S. 19 (1983), there was actual litigation in which the contentions of the parties were on the record. If the Court of Appeals' decision is allowed to stand, virtually all enforcement-related work of government attorneys will be exempt, whether or not there is any public explanation of the basis of an agency decision. *See NLRB v. Sears Roebuck & Co.,* 421 U.S. 132 (1975).

CONCLUSION

This Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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August 29, 1994

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 120-August Term 1993
(Argued August 31, 1993 Decided March 3, 1994)
Docket No. 93-6051

A. MICHAEL'S PIANO, INC., TRACY PATRICK SMITH, NICHOLAS VITAGLIANO AND MARIA VITAGLIANO,
Plaintiffs-Appellants,

— v. —

FEDERAL TRADE COMMISSION,
Defendant-Appellee.

Before:

FEINBERG, CARDAMONE AND ALTIMARI,
Circuit Judges.

A. Michael's Piano, Inc. *et al.* appeal from an order filed on January 29, 1993 in the United States District Court for the District of Connecticut (Covello, J.) that granted summary judgment to the United States Federal Trade Commission in an action appellant instituted for disclosure of agency documents under the Freedom of Information Act, 5 U.S.C. § 552 (1988).

Affirmed, in part, *and vacated and remanded*, in part.

JONATHAN W. CUNEO, Washington, D.C., *for Plaintiffs-Appellants.*

JOHN F. DALY, Appellate Staff, Civil Division, Department of Justice, Washington, D.C. (Leonard Schaitman, Attorney; Stuart E. Schiffer, Acting Assistant Attorney General; Albert S. Dabrowski, United States Attorney, Department of Justice, Washington, D.C., of counsel), *for Appellee.*

CARDAMONE, *Circuit Judge*:

The Federal Trade Commission (FTC) has in its possession corporate records voluntarily submitted to it by a manufacturer on the understanding they would be shielded from public disclosure. A former retail distributor of the submitting corporation's products seeks to obtain these records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1988). Full agency disclosure under that "sunshine law" has as its premise the Founders' view that "the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived." *The Federalist No.* 49, at 313-14 (James Madison) (Clinton Rossiter ed., 1961). When the FOIA bill was before the Senate Committee on the Judiciary, the Committee focused on Madison's observation that our government, relying as it does on the consent of the governed, may not succeed unless its "people who mean to be their own governors . . . arm themselves with the power knowledge gives." S. Rep. No. 813, 89th Cong., 1st Sess. 2, 3 (1965). To arm the public with knowledge, it must be able to obtain information concerning the activities of federal agencies.

Of course, if every document in the possession of a federal agency was freely available to the press or public, not many documents would be voluntarily submitted. In striking a balance between the incompatible notions of disclosure and privacy when it enacted FOIA in 1966, Congress established—in the absence of one of that law's clearly delineated exemptions—a general, firm philosophy of full agency disclosure, and provided *de novo* review by federal courts so that citizens and the press could obtain agency information wrongfully withheld. *De novo* review was deemed essential to prevent courts reviewing agency action from issuing a meaningless judicial imprimatur on agency discretion. *See* S. Rep. No. 813, at 8.

Resolving the conflicting concerns of full public disclosure and the safeguarding of privacy rights is always a difficult task.

In resolving that conflict on this appeal, the best path to follow is the one taken by Congress in 1966—one that protects both interests as much as possible, but with special emphasis on granting the fullest responsible disclosure.

FACTS

Plaintiff, A. Michael's Piano, Inc. (Michael's Piano), appeals from a January 29, 1993 judgment of the United States District Court for the District of Connecticut (Covello, J.) granting defendant FTC's motion for summary judgment[1]. The FTC conducted an investigation of Steinway and Sons (Steinway) with respect to that manufacturer's warranty practices regarding allegedly defective pianos in the years 1990-92. Michael's Piano sought disclosure under FOIA of materials generated by that investigation.

Michael's Piano, whose business is located in Waterford, Connecticut, became an authorized Steinway dealer in September 1982 and soon became the largest single-location Steinway dealer in the nation. Its success was attributed, it tells us, in part to its steadfast refusal to follow Steinway's "suggested" retail prices. While well pleased with its retailer's sales record,

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[1] There were three additional individual plaintiffs in the trial court who made no appeal from the court's grant of summary judgment to appellee FTC. Appellate jurisdiction exists only as to Michael's Piano because it is the only party specifically designated as an appellant in the notice of appeal. The other plaintiffs were ostensibly included in the notice of appeal by the use of the Latin phrase "et al." following the plaintiff's identification as "A. Michael's Piano, Inc." But the use of the term "et al." ("and others") in a notice of appeal does not designate such parties as appellants with requisite specificity sufficient to make them appealing parties subject to our jurisdiction. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317-18 (1988); *Shatah v. Shearson/American Express, Inc.*, 873 F.2d 550, 552 (2d Cir. 1989).

Steinway representatives pressured the dealer to adhere to the manufacturer's suggested retail prices. This difference in marketing approach culminated in late 1987 when Steinway offered a new dealership contract to Michael's Piano, which would have replaced their already existing contract. The dealer refused it. Steinway thereafter refused to ship Michael's Piano new pianos for resale.

Plaintiff continued to sell Steinway pianos from its inventory from 1987 to 1989 and to service those it had already sold. In the course of servicing those pianos, the retailer allegedly noticed a number of instruments with cracked soundboards and in some cases separations of the soundboards from the ribs that hold them in place. In 1990 approximately 60 of the retailer's customers called the State of Connecticut's attention to problems they were experiencing with Steinway pianos. The Connecticut Attorney General forwarded a number of these complaints to the FTC. The complaints averred that Steinway had failed to honor warranties, particularly those with respect to cracks or other asserted flaws in the soundboards of its pianos. The FTC thereafter commenced an investigation into these allegations to determine whether it should take legal action against Steinway for possible violations of either § 5 of the FTC Act, 15 U.S.C. § 45 (1988), or the FTC's rules implementing the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (1988).

The preliminary or "initial phase" investigation was commenced under the authority of the Director of the FTC's Boston Regional Office and conducted principally by Sara Greenberg, an FTC attorney. In January 1991 Ms. Greenberg filed a memorandum that made a recommendation regarding whether the investigation should be expanded into a "full-phase" investigation— a determination that had to be made by the Director of the FTC's Bureau of Consumer Protection. *See Federal Trade Commission Operating Manual* § 3.5.1 (1991). Dennis Mur-

phy, an FTC economist assigned to assist in the investigation, also prepared a memorandum as to whether the initial investigation should be carried further. Following submission of these recommendations, a "full-phase" investigation was authorized by appellee's Bureau of Consumer Protection.

During both phases of the investigation, the FTC requested and received information from Steinway and from a number of other persons and piano manufacturers, including, for example, Baldwin Piano and Organ Company, Kawai America Corporation, Mason & Hamlin Corporation, Yamaha Corporation of America, Schimmel Piano Corporation and C. Bechstein Piano Corporation, all competitors of Steinway. During the preliminary part of the inquiry on September 24, 1990 the FTC made a written request of Steinway for information. This letter requested a broad range of documents and information concerning the manufacturer, its dealers, manufacturing processes, and warranty practices. The letter requested that Steinway submit this material "voluntarily. . .[i]n furtherance of [the pending] investigation." It further stated the FTC's understanding that, pursuant to § 21(f) of the FTC Act, 15 U.S.C. § 57b-(2)f, information "provided voluntarily in lieu of compulsory process in a law enforcement investigation, such as [that] provided in response to this letter, [is] exempt from public disclosure under [FOIA Exemption 3]."

Later, during the full-phase investigation, the FTC sought by letter of March 7, 1991 further voluntary submissions from Steinway. In response to these FTC requests Steinway voluntarily submitted a substantial amount of additional information. The FTC also sought, orally or in writing, and received information from a number of retail piano dealers, technicians, and owners. The appellee's staff informed the persons solicited that information voluntarily submitted in this manner would be protected by § 21(f). Michael's Piano seeks disclosure of these materials.

During its investigation, the FTC engaged an expert consultant, David Betts, to inspect the soundboards of a number of Steinway pianos and to provide advice concerning the existence and extent of any defects. Michael's Piano also seeks copies of the correspondence between Mr. Betts and Ms. Greenberg regarding these inspections.

In December 1991 Ms. Greenberg prepared a memorandum analyzing the issues presented and making a recommendation regarding the final disposition of the inquiry. Again, final authority for a decision to close or to proceed further with the investigation rested with the Director of the Bureau of Consumer Protection. In January 1992 the Bureau of Consumer Protection closed the investigation. Michael's Piano seeks copies of Ms. Greenberg's memorandum and other inter-office memoranda leading up to this disposition of the case.

Plaintiff submitted a formal FOIA request to the FTC in January 1992, seeking copies of all letters and documents gathered by the FTC during its investigation of Steinway. The FTC granted the request, in part, and denied it, in part, citing FOIA exemptions 3 and 4 as protecting those records voluntarily submitted by Steinway and others, and FOIA exemption 5 as shielding internal FTC documents. Michael's Piano took an administrative appeal from this determination, which was denied by the FTC's General Counsel in a letter dated May 12, 1992.

On July 13, 1992 plaintiffs filed the instant suit in the District of Connecticut. The FTC moved for summary judgment on October 19, and after plaintiffs responded on November 20, 1992, the district court granted the motion on January 27, 1993. From this judgment, Michael's Piano appeals.

DISCUSSION

Two issues are presented for our analysis: one under exemption 3 and the other under exemption 5 of FOIA. We must decide first whether the documents submitted to the FTC during its investigation qualify as information "provided voluntarily in place of . . . compulsory process," within the meaning of § 21(f) of the FTC Act, 15 U.S.C. § 57b-2(f) (1988), and are therefore exempt as a matter of law from disclosure under FOIA exemption 3, 5 U.S.C. § 552(b)(3). Second, it must also be determined if any material issues of fact exist regarding whether the requested memoranda and other internal FTC documents meet the requirements of exemption 5, 5 U.S.C. § 552(b)(5), so as to be exempt from disclosure.

I FOIA EXEMPTION 3

A. *Obtaining Exemption 3 Exclusion from Disclosure*

FOIA, as its name suggests, expresses a public policy in favor of disclosure so that the public might see what activities federal agencies are engaged in. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989); *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976). To that end, any member of the public is entitled to have access to any record maintained by a federal agency, unless that record is exempt from disclosure under one of the Act's nine exemptions. *See* 5 U.S.C. § 552(a)(4)(B). It is the responsibility of the federal courts to conduct *de novo* review when a member of the public challenges an agency's assertion that a record being sought is exempt from disclosure. *See id.* The burden of proof, upon such review, rests with the agency asserting the exemption, with doubts resolved in favor of disclosure. *See Federal Labor Relations Auth. v. United States Dep't of Veterans Affairs*, 958 F.2d 503, 508 (2d Cir. 1992).

The extent of most FOIA exemptions, which reflect Congress' recognition that releasing certain records might prejudice legitimate private or governmental interests, *see FBI v. Abramson*, 456 U.S. 615, 621 (1982), are defined by FOIA itself. But exemption 3, with which the present discussion is concerned, incorporates the policies of other statutes. A subject statute that meets exemption 3 requirements may effectively exclude certain matters from disclosure, namely, as stated in exemption 3, those matters "specifically exempted from disclosure by [the subject] statute." 5 U.S.C. § 552(b)(3).

The two threshold criteria needed to obtain exemption 3 exclusion from public disclosure are that (1) the statute invoked qualifies as an exemption 3 withholding statute, and (2) the materials withheld fall within that statute's scope. *See CIA v. Sims*, 471 U.S. 159, 167 (1985); *Baldrige v. Shapiro*, 455 U.S. 345, 352-53 (1982). The parties agree that § 21(f) of the FTC Act meets the first criteria of the *Sims* test. Section 21(f) provides:

> Any material which is received by the Commission in any investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission, and which is provided pursuant to any compulsory process under . . . [the FTC Act] or which is provided voluntarily in place of such compulsory process shall be exempt from disclosure under section 552 of Title 5.

15 U.S.C. § 57b-2(f). The parties are also in accord that none of the documents sought were submitted to the FTC "pursuant to any compulsory process."

B. *Scope of Review*

The parties believe we must decide the scope of review to be applied to the withholding statute. Michael's Piano urges that the withholding statute—here § 21(f)—should be construed

narrowly as are the FOIA exemptions themselves. The FTC disagrees. Courts have differed on this issue. *Compare Aronson v. I.R.S.*, 973 F.2d 962, 965-66 (1st Cir. 1992) *with Anderson v. Department of Health & Human Servs.*, 907 F.2d 936, 950-51 (10th Cir. 1990).

In *Anderson* the Tenth Circuit declined to give a broad construction to an exemption set forth in the Food, Drug & Cosmetic Act because of the narrow construction accorded FOIA's exemptions. *See* 907 F.2d at 951. The contrary rationale relied on by the First Circuit in *Aronson* was that principles applicable to FOIA did not square with Congress' purpose in enacting the tax information disclosure statute at issue. The withholding statute's provisions must therefore be examined, the First Circuit stated, under deferential administrative law standards, as set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984), which only permit reversal by a federal court when the agency interpretation is arbitrary, capricious or an abuse of discretion. *See* 973 F.2d at 965-67.

Several other circuits have joined the Tenth Circuit in ruling that FOIA disclosure and review requirements—not deferential administrative law standards—govern the same tax withholding statute presented the First Circuit in *Aronson*. *See, e.g., Church of Scientology v. IRS*, 792 F.2d 146, 148-50 (D.C. Cir. 1986), *aff'd*, 484 U.S. 9 (1987); *Grasso v. IRS*, 785 F.2d 70, 74-75 (3d Cir. 1986); *Linsteadt v. IRS*, 729 F.2d 998, 1003 (5th Cir. 1984); *Currie v. IRS*, 704 F.2d 523, 526-27 (11th Cir. 1983). *But see King v. IRS*, 688 F.2d 488, 493 (7th Cir. 1982).

We see no need to choose sides in the conflict between our sister circuits. As the FTC correctly points out, the Supreme Court has never applied a rule of narrow or deferential construction to withholding statutes. Thus, we follow the approach taken by the Supreme Court in construing withholding statutes, looking to the plain language of the statute and its legislative history,

in order to determine legislative purpose. *See, e.g., CIA v. Sims*, 471 U.S. at 168-73.

C. *Construction of Section 21(f)*

The exemption 3 issue then is whether the documents Michael's Piano thinks it is entitled to see were "provided voluntarily in place of such compulsory process." Conducting a *de novo* review we must determine whether the FTC met its burden of proving that the documents withheld pursuant to Exemption 3 fell within the scope of § 21(f) of the FTC Act. In granting summary judgment for the FTC, the district court broadly construed § 21(f) as exempting from disclosure all materials voluntarily provided. Because its plain language sheds no light on how courts should construe this withholding statute, we address the litigants' arguments with reference to § 21(f)'s legislative history.

Appellant's principal disagreement with the trial court's ruling is that the material appellant sought was never subject to compulsory process because such may only be initiated by the Federal Trade Commission itself, not the Regional FTC or its staff officers or attorneys. Hence, absent a viable possibility of compulsory process, appellant tells us, there can be no voluntary submission of materials in place of compulsory process. Michael's Piano further declares the district court's reasoning was wrong because it makes disclosure to the public more difficult, contrary to the teaching of the Supreme Court that exemptions to FOIA are to be narrowly construed. *See United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989).

The statute cannot be read to turn on whether material submitted voluntarily was so provided because compulsory process was a "viable possibility." Such a vague and amorphous formulation would create needless difficulties for the courts that would be obliged to apply it. It would be particularly inappropriate in the FOIA context where the Supreme Court views the FOIA exemptions as being intended to set up "concrete, work-

able standards for determining whether particular material may be withheld" from public scrutiny, *see EPA v. Mink*, 410 U.S. 73, 79 (1973).

While we reject the amorphous construction of § 21(f) offered by Michael's Piano, we also reject that offered by the district court, which ruled, in effect, that all voluntarily submitted documents were exempt. This interpretation of § 21(f) is too broad. Were all information voluntarily furnished an agency in the course of an investigation exempt, the public would be denied access to information that FOIA envisions being disclosed. Moreover, the ruling reads out of the plain language of the FTC Act the limitation on the withholding provision at issue— that the materials be submitted in lieu of compulsory process. For example, under the district court's broad ruling, public access to information furnished by third parties other than the target of the investigation would be foreclosed, even when the material had not been sought by the agency. It would also preclude public access to materials furnished that are not relevant to, or are outside the scope of the investigation, and for that reason not subject to the agency's subpoena power. *Cf. FTC v. Carter*, 636 F.2d 781, 788 (D.C. Cir. 1980) (documents "not plainly irrelevant" may be subpoenaed). Such broad exemption creates too heavy a cloak of gratuitous secrecy. Hence, we cannot adopt it.

Moreover, the legislative history of § 21(f) indicates that in enacting § 21(f) Congress did not plan for the exemption to apply to all materials voluntarily submitted to the FTC during the course of an investigation. The most pertinent information is found in H.R. Conf. Rep. No. 917, 96th Cong., 2d Sess. 27 (1980), *reprinted in* 1980 U.S.C.C.A.N. 1143. That Report explains, in a joint statement by House and Senate managers, the effect of their actions in amending the Federal Trade Commission Act when the two Houses of Congress had disagreeing votes. On the subject of the confidentiality of materials received

by the FTC, the House bill had no provision. The Senate amendment was extremely broad, providing that: "*any* material provided pursuant to *any* demand *or otherwise* provided by *any* person shall be exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b)." *Id.* at 32, 1980 U.S.C.C.A.N. at 1149 (emphasis furnished).

The Conference substitute substantially narrowed the Senate's version and specified that any material received in a Commission investigation, provided it was pursuant to compulsory process under the Act or voluntarily in lieu thereof, shall be exempt from disclosure under FOIA. *Id.* at 33, 1980 U.S.C.C.A.N. at 1149-50. Thus, Congress planned for the words "provided voluntarily in place of such compulsory process" to be a limit on the scope of § 21(f).

The FTC in arguing for a broad construction of the exemption provision points to remarks by Senator Ford, a sponsor of the FTC Improvements Act of 1980, who noted the difficulties that the FTC encountered in obtaining information from businesses because of fears that confidential information would be publicly disclosed. *See* 126 Cong. Rec. 11914 (1980). But the FTC neglected to call to our attention other remarks made by Senator Ford during the same debate: "The main purposes of the exemption are to protect proprietary data without affecting agency accountability to the public through the FOIA and to encourage compliance with legitimate information demands." *Id.*

As a consequence, while it is true that the confidentiality provision of the FTC Act was intended to encourage disclosure to the FTC by businesses, it is also true that Congress did not intend to create a broad exemption that would effectively eliminate the FTC's accountability to the public. In fact, it is evident from the Senate debates that a major impetus for the bill was to curtail the FTC's abuse of its power. For example, as Senator Cannon stated:

> The real reason that we have proposed this legislation for the FTC is because the Commission appeared to be fully prepared to push its statutory authority to the very brink and beyond. The FTC lost sight of the necessity to listen to the evidence and legal arguments of its opponents. Good judgment and wisdom had been replaced with an arrogance that seemed unparalleled among independent regulatory agencies.

Id. at 11917. We do not believe Congress aimed to curtail the FTC's exercise of its authority and at the same time provide it with a blanket exemption from FOIA for all documents submitted to it voluntarily.

Instead, guided by Congress' aim, the language and the legislative history of § 21(f), we think a workable standard is one that permits the FTC properly to invoke § 21(f) by showing that (1) it had requested documents that were (2) relevant to an ongoing investigation within its jurisdiction and (3) the documents could have been subpoenaed had the party refused to comply with the FTC's requests. The FTC has authority to issue civil investigative demands or subpoenas, *see* 15 U.S.C. § 57b-1(c)(1), so long as the demand for information is signed by a Commissioner pursuant to a Commission resolution. *See id.* § 57b-1(i); *see also* 15 U.S.C. § 49 (1988) (authorizing FTC to subpoena documents related to an investigation); *McDermott v. FTC*, 1981-1 Trade Cas. (CCH) ¶ 63,964 (D.D.C. 1981).

The FTC need not go to the trouble of actually authorizing the issuance of a subpoena for the production of these documents, so long as a reviewing court is satisfied that the documents then in the agency's possession were, when obtained, subject to the agency's subpoena power. Because the district court ruling in the case at hand may have inadvertently limited public disclosure, we must remand the exemption 3 portion of the case to the district court for it to apply the three factors just

outlined in order to determine whether exemption from disclosure to any challenged documents is appropriate.

II FOIA Exemption 5

We turn now to appellants' request for documents that the FTC claims are shielded from public disclosure as internal agency records. FOIA exemption 5 permits the withholding of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This exemption incorporates into FOIA all the ordinary civil discovery privileges. *See Hopkins v. United States Dep't of Hous. & Urban Dev.*, 929 F.2d 81,84 (2d Cir. 1991). We are unable to discern any genuine issues of material fact that would suggest the documents the FTC withheld as exempt under exemption 5 do not fall under either the attorney work product or the deliberative process privileges.

A. *Attorney Work Product*

The attorney work product privilege protects "the files and the mental impressions of an attorney ... reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways" prepared in anticipation of litigation. *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). Although factual materials falling within the scope of attorney work product may generally be discovered upon a showing of "substantial need" under Fed. R. Civ. P. 26(b)(3), under exemption 5 the test is whether information "would 'routinely be disclosed' in private litigation." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 n.16 (1975) (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966)).

Michael's Piano does not dispute that the FTC documents at issue fall within the categories of materials covered by the work product privilege as incorporated by exemption 5. Rather,

its position is that because some of the documents may have been prepared after the staff attorney in charge of the investigation (Ms. Greenberg) had decided not to recommend enforcement litigation, there is a material issue of fact as to which documents were prepared "in anticipation of litigation." That is to say, some of the withheld documents may have been prepared in anticipation of closing the investigation.

The district court ruled that exemption 5 still applies, even if a staff attorney is considering or recommending closing an investigation. The courts have taken a flexible approach in determining whether the work product doctrine is applicable, asking not whether litigation was a certainty, but whether the document was created "with an eye toward litigation." *Hickman*, 347 U.S. at 511. Here the FTC investigation was not closed at the time the documents at issue were created, and the fact that staff members may have thought that litigation might not ever occur does not take the documents out of the scope of those materials exempt because they were created in anticipation of litigation. Instead, the reports and recommended action with respect to the status of an investigation submitted before any final decision is made as to the course an investigation qualify as documents prepared in anticipation of litigation. Hence, the district court's determination that there was no material issue of fact and its subsequent grant of summary judgment on this issue should be affirmed.

B. ***Deliberative Process***

The government's deliberative process privilege "protects the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions." *Hopkins*, 929 F.2d at 84. For the privilege to apply the document must be a predecisional and not a "postdecisional memoranda setting forth the reasons for an agency decision already made." *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975).

Appellant asserts there are factual questions as to whether certain withheld documents were postdecisional explanations of the FTC's prior decision to close the Steinway investigation. Specifically, it avers a memorandum from Ms. Greenberg to the FTC's Director of the Bureau of Consumer Protection, containing her recommendation regarding the disposition of the investigation, may have been written after the real decision to close the investigation had been made and that the intention of the "closing memorandum" furnished an informal record of why the agency did not pursue a particular investigation.

But the investigation was not closed and Ms. Greenberg had no authority to close it. As already explained, only the Director of the Bureau of Consumer Protection had the authority to make such a decision. The Supreme Court instructs that advisory reports by individuals without authority to issue final agency dispositions are predecisional. *See Renegotiation Bd.*, 421 U.S. at 185-87; *Hopkins*, 929 F.2d at 85. ("[B]ecause HUD inspectors themselves lack any authority to take final agency action, their reports are necessarily predecisional."). Thus, the questioned memorandum falls under the deliberative process privilege and is exempt from public disclosure under exemption 5.

Michael's Piano further maintains that other withheld documents are not privileged deliberative process documents because they are factual in nature. It cites, as examples, the report made by David Betts after he inspected Steinway pianos that allegedly had defective soundboards and interim reports summarizing the facts of the investigation. The work product privilege draws no distinction between materials that are factual in nature and those that are deliberative. *See Martin v. Office of Special Counsel, MSPB*, 819 F.2d 1181, 1187 (D.C. Cir. 1987). Because the documents withheld are privileged under the work product doctrine, it is irrelevant that they do not also fall within the scope of the deliberative process privilege.

In sum, the district court's grant of summary judgment as to the withholding of documents under exemption 5 should be affirmed because there is no material issue of fact as to whether they were created in anticipation of litigation or were predecisional intra-agency documents aiding in the FTC's decision-making process.

CONCLUSION

For the reasons stated, the judgment appealed from is accordingly affirmed, in part, and vacated and remanded, in part, for further proceedings consistent with this opinion.

The following document
is the opinion of the
District Court as issued.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

A. MICHAEL'S PIANO, INC., ET AL.,
Plaintiffs,

v.

FEDERAL TRADE COMMISSION,
Defendant.

Civil No. 2:92CV00603 (AVC)
OCTOBER 16, 1992

DEFENDANT FEDERAL TRADE COMMISSION'S
MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the defendant, the Federal Trade Commission, moves for summary judgment in its favor. Summary judgment is appropriate on the grounds that there are no disputed issues of material fact and that defendant is entitled as a matter of law to judgment in its favor on plaintiffs' action for disclosure of documents under the Freedom of Information Act, 5 U.S.C. § 552.

ORAL ARGUMENT IS REQUESTED

1/26/93. Civ. No. 292cv603(AVC). Having examined the descriptive index of the documents at issue, the court grants the defendant's motion for summary judgment (doc. no. 21).

Although the goal of the Freedom of Information Act (FOIA), 5 U.S.C. §§ 552(b)(3) - (7), is to provide the public with access to information about the government's activities, that purpose is balanced by nine exemptions designed "to preserve the confidentiality undeniably essential in certain areas of Government operation." *Administrator v. Robertson*, 422 U.S. 255, 261 (1975). The two exemptions applicable here are FOIA exemption 3, 5 U.S.C. § 552(b)(3), and exemption 5, 5 U.S.C. § 552(b)(5).

The relevant statute with respect to exemption 3 is § 21(f) of the Federal Trade Commission (FTC) Act, 15 U.S.C. § 57b-2(f). Section 21(f) provides:

> Any material which is received by the Commission in any investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission, and which is provided pursuant to any compulsory process under . . . [the FTC Act] *or which is provided voluntarily* in place of such compulsory process shall be exempt from disclosure under section 552 of Title 5. (emphasis added.)

Although the plaintiffs essentially argue that the defendants must threaten compulsory process before the exemption applies, the court concludes that that proposition flies in the face of the plain language of § 21(f), which exempts voluntarily provided documents.

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). With the exception of E-6 and F-1, all documents in categories A through F are protected by the attorney work-product doctrine and/or the governmental deliberative process privilege.

The attorney work-product doctrine protects memoranda and other documents prepared by an attorney *in contemplation of litigation. Hickman v. Taylor*, 329 U.S. 495, 509-512 (1947); F.R.C.P. 26(b)(3). Contrary to the plaintiff's argument, even if a staff attorney is considering or recommending closing an investigation, the exemption still applies. *Senate of Puerto Rico v. United States Dep't of Justice*, No. 84-1829 (D.D.C. May 13, 1992).

The government deliberative process privilege "protects the decisionmaking processes of the executive branch in order

to safeguard the quality and integrity of governmental decisions." *Hopkins v. United States Dept. of Housing and Urban Development*, 929 F.2d 81, 85 (2d Cir. 1991). Contrary to the plaintiff's argument, a staff memorandum to the director of the Bureau of Consumer Protection recommending disposition of the investigation is not a non-exempt post-decisional document. *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp*, 421 U.S. 168, 185-188 (1975). It is so ordered.

/s/
Alfred V. Covello, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

A.MICHAEL'S PIANO, INC., ET AL

VS.

FEDERAL TRADE COMMISSION

2:92 CV 00603 AVC

JUDGMENT

This action having come on for consideration of the defendant's motion for summary judgment before the Honorable Alfred V. Covello, United States District Judge, and,

The Court having considered the full record of the case including applicable principles of law, and the Court having granted the motion,

It is accordingly ORDERED, ADJUDGED AND DECREED that amended judgment be and is hereby entered in favor of the defendant.

Dated at Hartford, Connecticut, this 29th day of January 1993.

KEVIN F. ROWE, Clerk

By:

/s/
Dennis P. Iavarone
Deputy in Charge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of May one thousand nine hundred and ninety-four.

A. Michael's Piano, Inc., Tracy Patrick Smith, Nicholas Vitagliano, and Maria Vitagliano
Plaintiff-Appellants,

v.

Federal Trade Commission,
Defendant-Appellee.

DOCKET Nos. 93-6051

A petition for rehearing having been filed herein by Plaintiff-Appellant A. Michael's Piano, Inc. in the above entitled matters,

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

FOR THE COURT,
GEORGE LANGE, III, Clerk
By:

/s/
Carolyn Clark Campbell
Chief Deputy Clerk